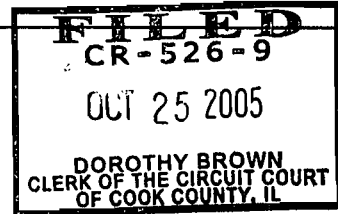


EXHIBIT 61



1 STATE OF ILLINOIS)
2) SS:
3 COUNTY OF C O O K)

4 IN THE CIRCUIT COURT OF COOK COUNTY
5 COUNTY DEPARTMENT-CRIMINAL DIVISION

6 THE PEOPLE OF THE)
7 STATE OF ILLINOIS,) Criminal
8 Plaintiff,) No. 02-16669
9 vs.) Charge: Murder, etc.
10 JAMES FLETCHER,)
11 Defendant.)

12 REPORT OF PROCEEDINGS had of the hearing
13 in the above entitled cause, before the Honorable
14 JOHN P. KIRBY, Judge of said court, on the 27th day
15 of September, 2005.

16 APPEARANCES:

17 HONORABLE RICHARD A. DEVINE,
18 State's Attorney of Cook County, by:
19 MS. AIDAN O'CONNOR,
20 Assistant State's Attorney,
21 for the People of the State of Illinois;
22 MR. FREDERICK COHN,
23 MR. JOSEPH SALTIEL,
24 for the defendant.

25 J. D. Williams, CSR #084-001757
26 Official Court Reporter
27 2650 S. California Ave.-4C02
28 Chicago, Illinois 60608

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I N D E X

Date of Hearing: 9-7-05
Page Numbers: 1 through 60

PROCEEDINGS

Motion for New Trial.

Sentencing Hearing.

1 THE CLERK: James Fletcher.

2 THE COURT: Step up, counsels.

3 I just received another, an additional
4 response. I'm going to read it at lunch and look at
5 the cases.

6 MR. COHN: Your Honor, the only reason today that
7 I didn't get the State's until yesterday.

8 THE COURT: All right, 1:30.

9 I'll take time to read it and look at the
10 cases.

11 MS. O'CONNOR: Can I ask you one question and
12 with counsel present.

13 THE COURT: Sure.

14 MS. O'CONNOR: If we get pass the motion for new
15 trial and we're going to proceed to sentencing, Judge,
16 I have a former prosecutor Neil Cohen on a phone call
17 to come in and testify about prosecuting defendant's
18 old murder case. Counsel indicated that he would
19 stipulate to his testimony but I just wanted to run
20 that by you to see if you would accept such a
21 stipulation.

22 THE COURT: Both sides agree to the stipulation.

23 MR. COHN: Yes, your Honor, the State has agreed
24 to stipulate to somethings. And I said that I was

1 going to object if we get that far to the imposition
2 of natural life but not on the basis that he is not
3 the person who was convicted.

4 THE COURT: Okay, all right.

5 MS. O'CONNOR: Thank you.

6 THE COURT: Then we'll start back at 1:30.

7 MR. COHN: Your Honor, is there any possibility I
8 want to ask you I have nobody in my office and I have
9 some people coming in to see me at 2:00 o'clock.

10 THE COURT: We can try at 1:00 o'clock.

11 MR. COHN: 1:00 o'clock would be perfect.

12 THE COURT: I have two other cases it will take
13 another fifteen minutes to finish up our call.

14 Be back here at 1:00 I'll see what we can do.

15 (The above-entitled cause was
16 passed and later recalled:)

17 THE COURT: Okay, People versus James Fletcher.

18 MR. COHN: Good morning, your Honor.

19 THE COURT: You can have a seat.

20 MR. COHN: Your Honor, we are here on my amended
21 motion for the trial --

22 THE COURT: Okay, hold on, counsel.

23 You can have a seat right in there. There
24 are two black chairs there.

1 Let's get everybody's name for the record.

2 MR. COHN: Attorney Frederick F. Cohn on behalf
3 of the defendant James Fetcher.

4 MR. SALTIEL: Joseph Saltiel on behalf of the
5 defendant James Fetcher.

6 MS. O'CONNOR: Aidan O'Connor for the People.

7 THE COURT: Okay. All right.

8 MR. COHN: Your Honor, there was pending before
9 you that had previously been filed a motion for new
10 trial by prior counsel. I filed an amended motion
11 for new trial which your Honor permitted me to file
12 which you permitted me to become co-counsel.

13 There is my amended motion for new trial,
14 there is the State's answer to my amended motion, and
15 my response to the State's amended answer. Sorry for
16 getting you my document today but I only got the
17 State's yesterday's afternoon.

18 THE COURT: That's great, I read the cases.

19 MR. COHN: Your Honor, the State has indicated to
20 me for the purposes of this hearing they would
21 stipulate that whatever is in the police reports would
22 be testified by the police officers if they were here.
23 I had subpoenaed one of the officers to corroborate
24 that Ms. Friend had told him that she was dating

1 Mr. Cooper and I was in the process of trying to
2 locate and bring in Officer Fleming though who he is
3 retired, officers are on, they get pensions like we
4 tried to get him here, your Honor, but the State had
5 indicated for the purposes of this hearing they will
6 stipulate what is in the police reports attached is
7 what they would testify to.

8 Is that correct, Ms. O'Connor?

9 MS. O'CONNOR: That is correct. However the one
10 item that you referred to, Judge, that he referred to
11 about a Ms. Friend said that she was dating him was
12 not a statement made to Detective Fleming it was a
13 statement made to Detective Bogucki.

14 MR. COHN: Right, that one was.

15 And the detective who is in fact still with
16 the police department, your Honor.

17 MS. O'CONNOR: Who was here today by the way and
18 is still here.

19 MR. COHN: But I am not going to put him on
20 because we have the stipulation that's what the
21 testimony would be, your Honor.

22 Your Honor, I'm only going to argue two of
23 the issues of what I assert were ineffective
24 assistance of counsel. But I wish to point out first

1 though and I am not going to repeat word-for-word but
2 this is a case where the prejudice caused by the
3 ineffectiveness is very strong because the evidence
4 against the defendant is very weak. I am not talking
5 about whether it is sufficient to convict but it is
6 clearly not a strong case.

7 There was no statement by the defendant, no
8 corroborating physical evidence such as fingerprints,
9 no identification by people who knew the defendant
10 from a prior time. And as I have set out in some of
11 the cases in my amended motion that considered one of
12 the least reliable type of evidence against an
13 individual is identifications of people who do not
14 know the person from a prior time and only saw them
15 under the pressure of the occasion, your Honor. That
16 is in this case.

17 Not only that we have an additional problem
18 in this case though we don't have sometimes somebody
19 commits a crime and is stopped within moments or maybe
20 the day and identified within a short period of time
21 afterwards which lends a lot of credibility to the
22 identification and the identification is very specific
23 and the, you know, the description of the assailant is
24 very specific and then the defendant matches that

1 description both either physical characteristics or
2 clothing they worn identical.

3 In this case we have Mr. Cooper giving a very
4 general height description, he says the person is
5 somewhere between 5'8 and 6 feet. That type of
6 discrepancy in cases have been found sufficient by
7 itself to raise a reasonable doubt where persons are
8 described as 5'8 and then the defendant is 6 feet tall
9 or the other way where they say a person is 6 feet and
10 the person arrested is 5'8. And we have a very
11 general description by Ms. Friend, your Honor.

12 We also have without even the impeachment
13 which I will be talking about later the impeachment
14 that occurred in this case, we have two witnesses who
15 have other credibility problems. Mr. Cooper admitted
16 that he lied to the police when he was first
17 questioned about whether he had a gun and Ms. Friend
18 was a person who had prior convictions, those
19 convictions were admitted and could be used under the
20 law for impeachment.

21 So, we do not have what would be clearly
22 considered in some courts an overwhelming evidentiary
23 case against the defendant. We have identification
24 by strangers and then we have certain errors that

1 occurred here by prior counsel. And by saying this I
2 am not saying that prior counsel is bad, you know,
3 drunk, it's just that lawyers, and I think the lawyers
4 here didn't have the type of experience necessary in
5 criminal defense --

6 MS. O'CONNOR: Objection, there is no evidence of
7 that, Judge.

8 THE COURT: Sustained.

9 MR. COHN: They just made mistakes and those
10 types of mistakes when they are prejudicial to the
11 defendant shouldn't cause a person to be convicted, it
12 is that simple, your Honor.

13 One of the first mistakes which was made is
14 your Honor admitted and I am not saying that the law
15 is against you on the issue of admitting evidence that
16 some stranger, some person who is not in court to
17 testify has accused the defendant. And the courts
18 say which are I have to admit the majority of courts,
19 I think the majority of courts are wrong and I think
20 the law is changing on that issue but I think
21 your Honor was bound by that decision to admit such
22 evidence that some other person said that the person
23 who committed the crime was Fletcher, the same name as
24 the defendant's name here.

1 Why that evidence without the instruction
2 given is so highly prejudicial in this case is because
3 in this case the jury based on the testimony of the
4 two witnesses Cooper and Friend said I don't -- I
5 didn't know the person before. Implicit in some
6 person out of court saying oh it was Fletcher who did
7 it you only know it was Fletcher who did it because if
8 you knew the person from a prior time. So the
9 out-of-court accuser would carry a lot more weight in
10 the eyes of the jury because it is somebody who as
11 they can figure it out would say it's somebody who
12 knew the assailant from a prior time. So, that's
13 very prejudicial.

14 And I know that you and the prosecutor will
15 take the position that such evidence is not admitted,
16 okay, for proof that some person out of court saw the
17 assailant here Fletcher do it. It is only one
18 problem which you and the prosecutor and other lawyers
19 may know there is no reason to believe the jury would
20 know that. The jury was never told that, the jury
21 was never instructed that when the evidence first came
22 in, the jury was never instructed that at the end of
23 the case. And I say -- evidence, and I set out in
24 from People versus Michael I believe and I am not

1 going to read the quotation on Page 2 of my amended --

2 THE COURT: Counsel, your cite was wrong on that
3 case it is not People versus Michael it is People
4 versus Michael Mitchell, a/k/a Michael P. Williams.

5 MR. COHN: Your Honor, I'm sorry, I apologize.

6 But the holding of the case I belief is
7 correct.

8 THE COURT: Yes, that case dealt with prior
9 inconsistent statements and 3.11.

10 Go ahead.

11 MR. COHN: Right. But it is very clear that we
12 presume jurors do not know the law and we -- that
13 presumption would mean that jurors would have every
14 right in this case to believe that the statements both
15 in opening statement in testimony and in final
16 argument, now I have attached the portions where it
17 occurred in my second document responding documents,
18 your Honor does not have to go digging through but I
19 do have the whole set of transcripts if your Honor
20 wants to see it, I have the transcript in this case,
21 but jurors would have every right to believe that they
22 could consider an accusation against the defendant
23 that some person out of court who knew the defendant
24 said the defendant is the person who did it, at least

1 a person with the defendant's name.

2 So, want is the best and securest way to make
3 sure that jurors don't do that and that is just like
4 evidence of gangs, evidence of other crimes, the
5 courts with all these issues said there should be a
6 limiting instruction telling the jury how to consider
7 such evidence.

8 And the cases with regards to other crimes
9 and gangs have said that we can't say to give this
10 instruction is strategic. As the Court said in
11 Hooker and Markiewicz on Page 5 of my memorandum: The
12 failure of an attorney to seek limiting instruction
13 when he is entitled to one is not a matter of
14 discretion or trial strategy. Markiewicz says the
15 same thing, your Honor, and that's what the law holds
16 and the lawyer here was ineffective for not requesting
17 such an instruction. There is no rational basis to
18 say that this was trial strategy.

19 The other main issue in this case,
20 your Honor, how lawyers failed is that there was
21 substantial impeachment evidence that the lawyers did
22 not use. I mean we have these two people Cooper and
23 Ms. Friend and supposedly they know each other through
24 the father of Ms. Friend but then there is evidence

1 that well I worked in a store and I knew him from the
2 store and the contradictions and then we dated she
3 says Ms. Friend. That evidence was in the police
4 report. The State stipulated that she specifically
5 told that to the officer.

6 That's clearly something that she should have
7 been questioned about because it raises a total
8 different concept of what their relationship was.
9 Different than what either one of them told the jury.
10 It is the type of thing which would cause the jury to
11 maybe what's going on here, something is wrong, why do
12 these people get up and attempt to mislead me as to
13 what their relationships are.

14 What other goes to that is the length of time
15 that they were together. The testimony of Cooper and
16 Ms. Friend sort of indicates that it was just a minute
17 or two. But no we have her giving a statement both
18 in her police report -- excuse me, in her written
19 statement, on Page 3 of her written statement. This
20 is the statement that she signed. Sheehan states
21 that she got into the bread truck through the
22 passenger's side door. Sheehan states that she and
23 Edwards were talking for about twenty minutes. That
24 was never brought out before the jury. It's very

1 different, it impeaches her. There is no strategic
2 reason to indicate that that shouldn't be brought out.

3 The State says well, third, some of the
4 alleged prior statements could have been more damaging
5 to the defendant than the trial testimony and
6 therefore trial counsel's none use of them was wisely
7 trial strategy. How. How was it damaging. How
8 was it damning. Just no way, no rational way.

9 And the failure to impeachment with prior
10 inconsistent statements as here, they are set out in
11 the body of my document is not, your Honor, the type
12 of thing that is not highly prejudicial.

13 I cited United States ex rel McCoy versus
14 O'Grady, I was the habeas corpus lawyer in those
15 cases, your Honor, and what happened was there was in
16 this case the failure to use -- the failure to use a
17 police officer's report to demonstrate that the
18 witness had said something totally distinct as to time
19 they had seen somebody.

20 And the 7th Circuit said first of all the
21 Illinois Appellate Court was in error when it said
22 failure to impeach is not, cannot be ineffective
23 assistance of counsel, said the appellate court was in
24 error about that and sent it back down for an

1 evidentiary hearing. And at the evidentiary hearing
2 Justice Manning who was in fact an assistant state's
3 attorney at one point for the State in this county and
4 then sat on the Illinois Appellate Court ruled that
5 the failure to impeach caused it to be ineffective
6 assistance of counsel.

7 We have the very similar type of impeachment
8 in this case, your Honor.

9 And I don't want to go over each and every
10 issue of impeachment because it is set out in writing
11 and your Honor has it in writing. And so we feel
12 that the defendant should be granted a new trial based
13 on these two issues.

14 THE COURT: State.

15 MS. O'CONNOR: Judge, counsel basically in his
16 amended motion for new trial and my reading of it
17 address three issues. He in argument today said
18 there were two issues. The third issue was that he
19 alleged that the defense was ineffective for not
20 litigating the motion to suppress the lineup
21 identification. And since I addressed this Exhibit
22 No. 18 from the trial in my answer I'm going to show
23 it to the Court and argue that an examination of that
24 exhibit which is a photograph of the lineup that was

1 used at the trial certainly shows that it was a fair
2 lineup and not suggestive in any way that would be
3 suggestive in the definition of what the case law says
4 it must be to be a suggestive lineup.

5 Yes, the defendant is slightly taller than
6 the other defendants but other than that I will not
7 repeat what I've said in my answer but it is a fair
8 lineup.

9 With regard to the other two issues, the
10 first one being a limiting instruction with regards to
11 course of investigation evidence, Judge, there is no
12 such limiting instruction and there is no such
13 limiting instruction because there is nothing to
14 limit. And perhaps counsel and I disagree on whether
15 hearsay was elicited at trial and it certainly seems
16 like we do disagree.

17 Our position is and I thoroughly read the
18 transcript and I read the transcript not only of the
19 witnesses but also of the opening statement by the
20 State and the closing arguments and never was hearsay
21 discussed in the arguments nor was it elicited from
22 witnesses, specifically Detective Bogucki during the
23 course of investigation evidence.

24 And that is what that evidence is. Why

1 should there be a limiting instruction. Jurors are
2 not suppose to take one kind of evidence and say
3 that's more important than another kind unless -- well
4 strike that. I mean evidence is evidence. And if
5 it is to be limited, for example, proof of other
6 crimes evidence that is well established concept in
7 the case law that that must be limited. And that is
8 why there is an I.P.I. instruction.

9 It is our position that course of conduct
10 investigation does not need a limiting instruction and
11 there was no hearsay elicited. And I think a careful
12 reading of the transcript would bear me out on that.

13 So, when counsel says they are ineffective
14 for not asking for a limiting instruction we would
15 reject that position and say that they didn't ask for
16 it because they shouldn't have asked for it. But in
17 the transcript they did ask for it during a sidebar
18 they asked you to limit, to give the jury right then
19 in there a limiting instruction which you denied and
20 we agree with the Court that at that -- that there was
21 no reason to give a limiting instruction.

22 So, for those reasons we ask this Court to
23 find that there was no ineffectiveness with regard to
24 that issue.

1 The case law on course of conduct evidence is
2 well established. The cases that I cited in my
3 answer, the Gaucho case spells it all out. And
4 defense attorneys and defendants never like the law
5 enunciated in that case because it is bad for them.
6 But that's the State of the law so everyone has got to
7 deal with it the way it is. And they don't like it
8 because they think juries are going to make inferences
9 from it. But there is no evidence that juries make
10 inferences from it and don't accept it on face value.

11 And there is a lot of case law that one of
12 the other side doesn't like because it puts them in a
13 harder position and that's the case here. I mean
14 they just don't like that we can bring out course of
15 investigation evidence.

16 Clearly the name Fletcher surfaced early on
17 in this investigation. It was in the original police
18 reports. The detectives that picked it up in '95
19 learned that by reading the police reports. They
20 were aware that someone of bear fact the name Fletcher
21 was known to the police from the start, they knew
22 that. And then after 1995 after they interviewed
23 Terry Rogers they were still looking for Fletcher.
24 And that is, that follows the rule enunciated in the

1 Gaucho case and any other of the cases that talk about
2 course of police investigation. So, again we would
3 ask you to deny that issue in their motion.

4 With regards to the impeachment then, Judge,
5 Mr. Cohn argues that there was huge substantial
6 impeachment of Cooper and Friend. And he indicates
7 two examples, the first one involving Cooper, the
8 second one involving Friend. The impeachment that he
9 says should have been brought out on Cooper he
10 compared the trial testimony to what he had said in a
11 police report. And I'm looking for the page.

12 And the testimony was with regards to at the
13 actual time right prior to and during the initial
14 approach by the offenders. And I'm referring to
15 counsel's Page 12 and 13 of this amended motion for
16 new trial.

17 And what we had argued in our answer to his
18 amended motion was that perhaps what the witness had
19 said early on in the case to the detectives was
20 actually better for the State than what he said at
21 trial and therefore why would his trial counsel want
22 to bring that out because it would actually bring out
23 more facts and would be more damning to the defendant.

24 And your Honor can read those two paragraphs

1 and we submit that the earlier statement that
2 Mr. Cooper made to the police that is quoted on
3 Page 13 actually has more detail and shows a better
4 recollection of what happened right after it happened.
5 There is more words spoken by the defendant and more
6 detail.

7 So, in our opinion it would have been a
8 mistake for a trial counsel to impeach Mr. Cooper with
9 his earlier better statement. Certainly a jury would
10 understand that you would remember perhaps more
11 details in 1990 than he would in 2005 when this trial
12 was heard.

13 Then you have his reference to impeachment
14 that he believes should have been used when Ms. Friend
15 testified and that's talked about on Page 13. And it
16 is with regards to how much time she was in the truck.

17 And in the middle of Page 13 Mr. Cohn refers
18 to some testimony and says she answered when asked how
19 do you know Mr. Cooper that Ms. Friend answered that
20 is my dad's friend. And then it refers to the
21 transcript and the page. And then says and she was
22 in the trunk for a short period of time. That was
23 not Ms. Friend's testimony.

24 MR. COHN: That is an error, I admit to that I

1 don't have the right page on that.

2 THE COURT: All right, we'll strike that.

3 MS. O'CONNOR: And she never said that. And she
4 couldn't have been impeached because she never said
5 that.

6 And then it goes on in the motion to talk
7 about her handwritten statement in the grand jury
8 where she says she was in the truck for twenty
9 minutes. It can't be impeaching because she never
10 said she was in the truck for a short period of time.
11 That is Mr. Cohn's interpretation of what she said
12 therefore it is not impeaching.

13 All other matters of impeachment brought up
14 are extremely collateral, Judge, extremely not
15 relevant and in no way could be considered dispositive
16 in turning the tables of how this jury evaluated the
17 evidence.

18 Mr. Cohn didn't talk about the impeachment
19 that trial counsel did implore and there were many
20 aspects of impeachment of both Ms. Friend and
21 Mr. Cooper that they attempted to show that they were
22 being discredited. So, the trial counsels were aware
23 of how to impeachment witnesses and they did use it
24 when it was important to use it.

1 Again we submit that the examples that he
2 gave were either very collateral, not having any
3 bearing on the ultimate issue here, or misrepresented
4 in the motion.

5 And with regard to Friend's testimony and
6 with regard to Cooper we submit his prior statement
7 would have been actually better for us so why would
8 Jenner and Block want to bring it out.

9 For those reasons, Judge, we are going to ask
10 you to deny this amended motion for new trial. And I
11 will rely on anything that's in my written answer and
12 former arguments at the original motion for new trial
13 as they relate to the issues that Mr. Cohn brought up.

14 If I could have just one second to look at
15 this response to the State's answer.

16 (Whereupon, a brief pause was had:)

17 MS. O'CONNOR: Judge, we have nothing further.

18 THE COURT: Okay, defense, you have the final
19 word.

20 MR. COHN: Yes, your Honor.

21 There is a substantial difference of
22 impeachment. It is one thing for both parties to say
23 gee I knew him once because he used to deliver bread
24 to the place where I did shopping, or he was a friend

1 of my father. That's very different of a type of
2 presentation to the jury of what the relationship is
3 than a dating relationship. And there is no dispute
4 by the prosecution that there was available to the
5 defense through the testimony of an officer whose name
6 start with a B who I can't pronounce who is available
7 that she had said that when she was about sixteen and
8 this man was about some thirty years old or older they
9 were in a dating relationship. That is a totally
10 different prospective of their relationship than was
11 conveyed by both of them to the jury. And proper
12 impeachment would have been to use that.

13 Also if you look at that testimony, that
14 testimony if it doesn't say specifically a short
15 period of time in those words it describes how in
16 essence it appears it was just for a few moments and
17 she had given both before the grand jury and in the
18 testimony that it was for twenty minutes, a much
19 longer period of time that should have been used to
20 discredit both of them.

21 Not only that if you look at what he said in
22 his testimony she told -- at the bottom of 12: She
23 told me at the laundromat did I have any change, and I
24 told her to wait until I put the trays in the truck.

1 When I opened the doors to the truck the guy came up
2 behind me. Meaning she never got in the truck
3 according to his testimony. Her testimony, okay, was
4 that she was in the truck for twenty full minutes.
5 Isn't that something that the jury should have known
6 in considering whether her testimony contradicted his
7 testimony of what was going on the way they were.

8 With regards to the issue of investigation,
9 your Honor. The State says well it is nothing, it is
10 just an investigation. Then why did they put it in.
11 If it wasn't -- if it wasn't to have the very impact
12 that we say it would have had why did the State put it
13 in. Why in opening statements do they put -- they
14 were looking for a man named Fletcher. It is
15 irrelevant unless you're putting it in to show that
16 somebody had named a person by the name of Fletcher,
17 somebody who wasn't there to testify. It's a total
18 sham to say that wasn't the prosecutor's purpose.

19 And it wasn't like it just slipped out
20 because they put it in the evidence. The witness,
21 where there were two male black offenders one witness
22 had provided the name Fletcher. Why did the State do
23 that. What is the purpose of that. What is the
24 purpose of showing, quote, "the investigation that was

1 going on". And if it was again a mistake, an
2 accident, it just happened, why was it used in final
3 argument. Why it was used in final argument again to
4 demonstrate that somebody, somebody who wasn't there
5 knew the assailant and identified him by the name of
6 Fletcher.

7 And not only the name at that point they were
8 looking for someone by the name of James Fletcher, not
9 just maybe the first name was Fletcher, maybe the last
10 name was Fletcher but James Fletcher. Why was that
11 argued to the jury if the purpose was not to
12 specifically show that some person who wasn't there.

13 And the Gaucho case was a pre-Crawford case.
14 And the concept of Gaucho is now in this array,
15 your Honor, because if it was said for testimonial
16 purposes under Crawford it is no longer admissible.
17 It would been admissible on the Gaucho if it was,
18 quote, "reliable" and therefore there was that
19 reliability test under Ohio v Roberts is no longer the
20 law under Crawford, your Honor.

21 So, if something is testimonial and this
22 would be the equivalent to testimony, your Honor.
23 What I'm saying is this is not a case where there was
24 overwhelming evidence this is the case where the

1 failure to use impeachment is like in the case that I
2 have attached here when Judge Manning granted the
3 federal habeas corpus writ.

4 Let's take a look at the photograph. I wish
5 I had a copy that I could write on.

6 MS. O'CONNOR: Well, you don't.

7 MR. COHN: I know I don't.

8 But look where the top of the heads of these
9 other people come they all come to the eye level of
10 the defendant, your Honor. He stands out, he is much
11 taller, he is much heavier.

12 Remember the testimony of one witness the
13 defendant has gotten heavier, bigger. Okay. He is
14 the only person that you can say he is not thin he is
15 bigger.

16 So, in totality of the situation, your Honor,
17 defendant was denied his constitutional right to a
18 fair trial.

19 FINDING

20 BY THE COURT:

21 Okay, I will take the motion for new trial
22 which I'll call the second motion for new trial. The
23 first argument is that going through it
24 chronologically is that the defendant's right to his

1 Sixth Amendment right to confrontation was thwarted
2 because of the testimony of detective that they were
3 looking for a person named Fletcher.

4 On Paragraph 2 of that motion it says that
5 such legal fiction while accepted by some courts must
6 be error here for the jury was never told as to the
7 limited use of such evidence.

8 First off, in regards to that limiting
9 instruction I went to the I.P.I. in regards to
10 limiting instructions and under 3.00 they specifically
11 enumerate specific instances where limiting
12 instruction is necessary.

13 In the introduction on Page 85 of the latest
14 edition of the I.P.I. it says that a general
15 proposition the committee disapproves of instructions
16 which comment on particular types of evidence, e.g.
17 flight. We agree with those cases holding that,
18 quote:

19 Courts are under a general obligation to
20 avoid giving instructions which unduly
21 emphasize one part of the evidence in a case
22 and are not required to give an instruction
23 that will provide the jury with no more
24 guidance than that available to them by

1 application of common sense.

2 Citing People versus McCullough found at
3 62 Il Ap 3d 590.

4 In the motion and also in the argument of
5 counsel for the defense these are the terms used in
6 that argument. That the Court admitted evidence that
7 a stranger accused the defendant of committing a
8 crime. That there was evidence that it was Fletcher
9 who did it because the person knew the defendant.
10 And the accusation was who knew the defendant was the
11 person who did it.

12 That was not the testimony brought out or
13 elicited at trial. There was a pre-trial motion in
14 regards to limiting that, this Court did limit it.
15 And I limited it under the rationale approved by this
16 Court and has not been overturn in Gaucho.

17 And in that particular case of People versus
18 Gaucho found at 122 Illinois 2d 221 that was dealing
19 with a police officer who interviewed one of the
20 victims in a hospital and he testified to the course
21 of conduct at trial. And it stated there
22 specifically:

23 Had the substance of the conversation that
24 the detective had with the victim been testified to it

1 would have been objectionable as hearsay. The
2 testimony of the detective however was not of the
3 conversation with the victim but to what he did and to
4 investigatory procedure. As our appellate court
5 stated in considering similar testimony such evidence
6 is not hearsay because it is based on the officer's
7 own personal knowledge and is admissible although the
8 inference logically to be drawn therefrom is that the
9 information received motivated the officer's
10 subsequent conduct.

11 The information received here is that they
12 were looking for a Mr. Fletcher. There was no
13 arguments or no testimony that any unknown individual
14 named Mr. Fletcher as being a participant in the
15 offense. That was not the fact here.

16 In regards to that particular area that was
17 cited the defense then argues that since there was no
18 limiting instruction and this course of conduct
19 testimony was admitted by the Court that that was
20 improper. And to argue that improper I see no cites.

21 Paragraph Page 2 it says hearsay evidence the
22 jury must be told of the limited purpose, with no
23 cite.

24 Also it says that the jury was never advised

1 that Fletcher argument testimony was admitted for a
2 limited purpose. Again no citation in regards to
3 this.

4 It goes on to say that they were permitted to
5 consider this accusation by some uncalled witness as
6 direct evidence of the defendant's guilt.

7 There was no accusation. There was just the
8 fact that someone, they were looking for Mr. Fletcher,
9 that's it. There was no accusation that he performed
10 any of the acts alleged or that he was wanted as a
11 criminal in this -- or as a defendant in this case.

12 Paragraph or on Page 3 it goes into what the
13 defense argues could have or would have happened
14 citing what could have or would have been implied by
15 the jury citing Washington or Crawford versus
16 Washington.

17 In Crawford versus Washington there has only
18 been one Illinois case that has been decided since
19 then. And in Crawford versus Washington that was a
20 case where I believe a wife testified, testimony came
21 in based on a statement she gave to the police
22 officers without subject to any cross-examination.

23 That was a specific statement concerning the
24 events of the crime. This is not the case here.

1 And I believe counsel has if the defense is correct in
2 regards to describing police interrogations as
3 testimony evidence as established under Crawford but
4 that is not the case that we have here. This is
5 under Gauchon and Gauchon has not been overruled by the
6 Illinois Appellate Court or Supreme Court.

7 Regarding that issue, that being the first
8 issue addressed here, I do not feel that the Court
9 made any improper rulings in regards to allowing the
10 course of conduct or for not giving a limiting
11 instruction even though I believe the defense did ask
12 at a sidebar.

13 In regards to Point No. 2 beginning on Page 4
14 it states that counsel, the trial counsel was
15 ineffective for not requesting an instruction that
16 limited the jury's consideration of the evidence.
17 Again trial counsel objected to the admission of this
18 evidence but never requested that the limited nature
19 be -- I mean limiting instruction be entered. I
20 believe that that is not the case. There was a
21 request and it was denied. It states that the
22 failure to have the jury provided with the limited
23 instruction in these facts is ineffective assistance
24 of counsel.

1 And then we go on, once again the comparison
2 to other crimes under People versus Hooker and People
3 versus Markiewicz which was also other crimes.
4 People versus Grave was the accomplice testimony.
5 And People versus Smith was gang evidence. All of
6 this I believe is different from the factual scenario
7 we have here.

8 In going to the case cited by the defense
9 People versus Markiewicz, M-a-r-k-i-e-w-i-c-z, found
10 at 246 Il Ap 3d 31. In there it sort of streamlines
11 the issue under Strickland versus Washington.
12 Quoting from Page A of that opinion it states:

13 There is a strong presumption that counsel's
14 performance at trial and at sentencing fell
15 within the range of acceptable behavior. To
16 prevail on a claim of ineffective assistance
17 of counsel a defendant must establish that:
18 1: Counsel's performance was so seriously
19 deficient that it fell below an objective
20 standard of reasonableness. And, 2: That
21 the deficient performance was so prejudicial
22 that the defendant was denied a fair trial.

23 To show actual prejudice the defendant
24 must demonstrate that but for counsel's

1 deficient performance there is a reasonable
2 probability that the result of the proceeding
3 would have been different.

4 An accused is entitled to competent not
5 perfect representation. The fact that a
6 defense tactic was unsuccessful does not
7 retrospectively demonstrate incompetence.
8 Therefore counsel's performance at trial will
9 not be deemed ineffective if the claimed
10 error was a matter of discretion, trial
11 tactics, or strategy. Although some of the
12 evidence in this particular case of
13 Markiewicz was admissible defense counsel
14 failed to object when the State withdrew a
15 pattern jury instruction limiting the use of
16 other crimes evidence.

17 In that particular case there was extensive
18 evidence of other crimes evidence.

19 Also in that case in regards to instructions
20 it is stated on Page 6:

21 Generally the only instructions necessary to
22 ensure a fair trial include the elements of
23 the crime charged, the presumption of
24 innocence, and the question of burden of

1 proof.

2 Based on the cases cited by counsel in
3 regards to the, I see a major difference in accomplice
4 testimony, proof of other crimes, and also I believe
5 the earlier one was prior inconsistent statement
6 instructions.

7 In regards to the instructions that were
8 asked for once again looking at the totality of the
9 circumstances here and the case law I don't find any
10 reason why the Court should have gave a limiting
11 instruction.

12 Therefore in regards to the failure to, of
13 this Court to give a limiting instruction and even
14 though the defense did ask I find that there was no
15 error.

16 I believe that the last part of that argument
17 is the eyewitness testimony. And in that particular
18 argument the defense argues that the witnesses,
19 eyewitness testimony was not sufficient to establish
20 proof beyond a reasonable doubt. In that particular
21 case the defense cites Peck and also extensively later
22 on United States versus Wade.

23 In regards to the case of People versus Peck
24 there was, that was a case where the Court said

1 considering all of the circumstances considered
2 together the eyewitness testimony wasn't sufficient.
3 In that particular case the victim testified that he
4 was robbed at night in the dark, that the victim had a
5 mask, that there was a flashlight, the defendant also
6 put on an alibi. And more specifically in that
7 particular case since it was a 1934 case there was no
8 lineup or any attempted show-up after the incident.

9 In the case of U.S. versus Wade the quote on
10 Page 11 in regards to what the Court looks at in
11 regards to determining whether or not a lineup is
12 suggestive I would like to, just give me one moment.
13 And People versus Wade they highlighted six specific
14 points that the Court looks at. On Page 11 there is
15 really seven, the Canadian case that was cited under
16 U.S. versus Wade found at 388 U.S. 218 was that in
17 that particular lineup there was only one oriental
18 involved in the lineup and he was the defendant.

19 But it went on to say that these are the
20 things that should be looked at. And I'm reading
21 from Page 11 counsel's brief. And there are three
22 points there but I'm going to go to the body of the
23 opinion itself because there was really six points
24 brought out.

1 It says similarly state reports in the course
2 of description prior identifications admitted
3 as evidence of guilt revealed numerous
4 instances of suggestive procedures. For
5 example: One, that all in the lineup of the
6 suspect were known to the identifying
7 witnesses. That is not the case higher.

8 Two, that the other participants in a
9 lineup were grossly dissimilar in appearance
10 to the suspect.

11 I'll address that issue.

12 And, three, that only the suspect was
13 required to wear distinctive clothing which
14 the culprit allegedly wore.

15 And then going to Page 7 of the opinion
16 itself it goes further:

17 That the witness is told by the police that
18 they have caught the culprit after which the
19 defendant is brought before the witness alone
20 or is reviewed in the jail.

21 That was not the case here.

22 That the suspect is pointed out before
23 or during the lineup.

24 And that is not the case here.

1 And that the participants in the lineup
2 are asked to try on an article of clothing
3 which fits only the suspect.

4 Again that is not the case here.

5 So, the six criteria set out in U.S. versus
6 Wade that courts look at and that commentators have
7 brought out in regard to that particular case was not
8 here.

9 Now, the defense has argued that the lineup,
10 that the defendant was grossly dissimilar because he
11 is taller and heavier. That is not the case that I
12 see. I see two individuals on both Mr. Fletcher's
13 left and right that are probably about -- one is about
14 two inches shorter, the other is about three depending
15 on his hair. I see all individuals are male black
16 looking about the same age, all are wearing dark
17 clothing on the bottom. Three -- four had gym shoes,
18 some have a sweater, a jacket, and an overcoat. I
19 mean a blue coat and I will call it an overcoat.

20 These are all arguments addressed by trial
21 counsel in regards to the attack on that.

22 In regards to taking that in conjunction with
23 the defense failure to file a motion to suppress based
24 on suggestiveness the case of People versus Wade also

1 highlights numerous incidents where this lineup is
2 conducted without the benefit of anybody other than
3 the police and the defendant seeing this. And it is
4 brought out a few times in that case that this is one
5 of the things that courts look at.

6 In this particular case, though, we had an
7 attorney who came into court and testified, I believe
8 it was Debra Sanders, who testified that she was
9 present for the lineup and in her opinion after giving
10 her background as an attorney, I believe she was a
11 professor of law at the present time it was her
12 opinion that that was suggestive. That was all put
13 in front of the jury for the jury to decide after they
14 received a photo to determine whether or not that
15 lineup was suggestive.

16 So, the failure, the failure to file a motion
17 to suppress having the attorney present to testify in
18 court of her opinion of that lineup I feel is just a
19 strategy issue. I believe that, I might be wrong on
20 the name Debra Sanders.

21 MR. SALTIEL: It's Ms. Gordon.

22 THE COURT: Ms. Gordon, all right, my notes are
23 wrong then, I'm sorry.

24 Well, Ms. Gordon in this Court's opinion was

1 an impressive witness with impeccable credentials and
2 I see why the defense wanted her in front of a jury.

3 So, with regard to the issue of the
4 suggestiveness of the lineup and the failure to file a
5 motion I believe the lineup was not suggestive taking
6 the criteria set out in Wade. And further I believe
7 that the motion to suppress was a strategic decision
8 made on behalf of counsels.

9 Now, the last issue that counsel brings up is
10 now the area of impeachment, that the impeachment of
11 the two civilian witnesses that being Ms. Friend and
12 Mr. Cooper was not adequate and therefore it was
13 deemed ineffective assistance.

14 I would like to point out the defense counsel
15 had mentioned that he was the attorney on the case of
16 McCall found at 908 Federal 2d 170. And I believe
17 counsel for the record you cited that wrong you put
18 908 Federal 3d.

19 But, in that particular case the defense
20 attorney, and I'm quoting from Page 2:

21 The defense attorney Shelly emphasized the
22 missing pieces in the State's case, that
23 there was no witness who saw McCall enter or
24 leave the victim's house. But she made no

1 attempt to cast out on less identification
2 testimony. She stopped.

3 In this particular case there was doubt cast
4 on the identification testimony from the very
5 beginning. The opening statement by the defense
6 stated this is a case of misidentification. They
7 further went in and brought out the description given
8 to the first officer on the scene. And then the
9 description given to the detectives Gilfer and
10 Fleming. And when both Mr. Cooper and Ms. Fleming
11 hit the stand they were exhaustively cross examined in
12 regards to their identification. So, I feel that the
13 facts here are somewhat different than the facts in
14 McCall.

15 In McCall they said, the Court did say that
16 failure to proceed on a line of impeachment could be
17 ineffective assistance after there is a sufficient
18 hearing established in the court.

19 The defense wants the, this Court to
20 basically say that those, because the
21 cross-examination was not thoroughly exhaustive in his
22 opinion that it therefore was ineffective assistance.
23 I don't feel that that is appropriate.

24 In the cross-examination here of Ms. Friend

1 and Mr. Cooper all the facts were brought out. I
2 believe even again going back to their opening
3 statement Mr. Cooper it was brought out that he had
4 told the officer at one time the individual looked
5 similar during the photo array but he wanted to see
6 him in person. They also brought out how Mr. Cooper
7 I believe spoke with a defense investigator and he
8 said I am only seventy-five percent sure.

9 These were all attacks on the identification
10 procedure and identification of those victims in this
11 case. That was not the case in McCall.

12 Also the fact that there was a difference in
13 the time frame brought out. The exhaustive
14 cross-examination here based on what I saw as a
15 strategy was their inability to observe what they said
16 they observed. I believe there was extensive
17 cross-examination in regards to facial features, size,
18 there was hair, there was whether or not Mr. Fletcher
19 has distinguishing characteristics. These were all
20 brought out during the course of that examination.
21 And they were not brought out in a leisurely or
22 haphazard manner, they were brought out thoroughly and
23 exhaustively.

24 In regards to the issue that the relationship

1 that existed between the parties would have swayed the
2 jury not to believe the testimony I don't believe
3 that's the case here.

4 And when you look at the, going back to the
5 criteria under People versus -- I'm sorry, Strickland
6 versus Washington this Court based on the totality of
7 the circumstances and the entire transcript of the
8 trial I find that counsel's performance was not
9 deficient and it did not fall below an objective
10 standard of reasonableness.

11 I also find that the deficient performance
12 was so prejudicial that the defendant was denied a
13 fair trial. That there was no deficient performance
14 that prejudiced this defendant's right to a fair
15 trial.

16 Lastly I don't feel that the defense at this
17 stage has made the argument that if that impeachment
18 would have been allowed in, those two specific
19 impeachments that it would have changed the outcome or
20 effected the outcome of this case.

21 In this particular case I think that there
22 was a sound trial strategy employed. The attorneys
23 of record that were in here each and every appearance
24 were always prepared. The argument that they did not

1 investigate this case is wholly without merit. Every
2 motion, every hearing date they were prepared with
3 everything they had. Their decision, their trial
4 strategy to attack the witnesses based on their
5 ability to observe was also sound strategy. And
6 their desire and their ability to place Ms. Gordon in
7 front of the jury to have her to testify what she
8 observed in the lineup again I believe was sound trial
9 strategy.

10 Taking all of the arguments by counsel in
11 regards to the motion for a new trial at this time the
12 motion for a new trial will be denied.

13 MR. COHN: Thank you, your Honor.

14 We are ready to proceed as to sentencing,
15 your Honor. We will stipulate that the defendant has
16 as the State says a prior conviction for a homicide.
17 The facts of that I think the State would agree the
18 crime occurred when he was sixteen, he was tried as an
19 adult and we would assert that the imposition of
20 natural life under those situations when he was
21 sixteen and pled guilty and to make it an automatic
22 natural life because he has a second conviction is
23 unconstitutional violation of due process and the
24 cruel inhuman provisions of the Eighth Amendment.

1 That's all we have to say, your Honor.

2 THE COURT: Okay, let's go through the sentencing
3 hearing itself.

4 MS. O'CONNOR: Judge, before we get into the
5 actual sentencing hearing I don't -- we attempted to
6 address the pre-sentence investigation at one point
7 but that was put aside due to the motions for new
8 trial and perhaps new counsel coming in.

9 At one point I had asked after we received
10 the P.S.I. to supplement it with Chicago's, Chicago
11 Police Department's old version of defendant's what we
12 call rap sheet which is a record history that actually
13 has the 1979 murder arrest resulting in 1980 murder
14 conviction on it. The one attached in the P.S.I. is
15 the new Chris version of the rap sheet and because the
16 defendant was a juvenile apparently it didn't show up
17 on the new version.

18 MR. COHN: We have no objection to submitting
19 that version of the document.

20 THE COURT: All right.

21 MS. O'CONNOR: And I had brought that up when
22 Jenner and Block was --

23 THE COURT: Okay.

24 MS. O'CONNOR: So I would ask leave to make this

1 old version of the rap sheet part of the Court's
2 pre-sentence investigation.

3 MR. COHN: No objection.

4 MS. O'CONNOR: They've all seen it.

5 THE COURT: Okay. And both sides had an
6 opportunity to observe or review the pre-sentence
7 investigation?

8 MR. COHN: Correct.

9 THE COURT: And are there any changes, deletions,
10 or additions?

11 MR. COHN: None.

12 MS. O'CONNOR: Well.

13 THE COURT: Other than the addition that you just
14 made.

15 MS. O'CONNOR: Yeah, I would like to add that,
16 have that made part of the P.S.I. and have Page 3
17 where it lists the defendant's convictions I would ask
18 leave to have that added to the paragraph Adult
19 Convictions even though he was a juvenile he was in --
20 it was an automatic transferred tried as an adult or
21 prosecuted as an adult. And the Page 3 fails to list
22 that although there is a paragraph where the defendant
23 told the investigator that he had been sentenced to
24 twenty-two years for felony murder and was released in

1 1990.

2 The defendant acknowledges it but it is not
3 officially listed in the P.S.I.

4 THE COURT: Okay.

5 MR. COHN: We have no objection to the amendment
6 to show that.

7 THE COURT: Okay. And the --

8 MS. O'CONNOR: It would be case No. 79-C-8441.

9 THE COURT: Okay. No objection, that that
10 amendment will be allowed and made part of the P.S.I.

11 MS. O'CONNOR: That is the only change that I'm
12 asking the Court to make.

13 THE COURT: Okay.

14 MR. COHN: When was that again, what is the case
15 number on that?

16 THE COURT: 79-C-8441.

17 MR. COHN: 79-C-8441.

18 MS. O'CONNOR: So, that's all the changes that I
19 have, I don't know if defense counsel has any.

20 MR. COHN: The defense has no changes, Judge.

21 THE COURT: All right, I'll listen to arguments,
22 State.

23 MS. O'CONNOR: Judge, I would first introduce
24 People's Exhibit No. 1 for sentencing which is a

1 certified statement of the defendant's prior murder
2 conviction.

3 MR. COHN: No objection.

4 MS. O'CONNOR: Under 79-8441 wherein the
5 defendant on December the 21st of 1979 was arraigned
6 and then on October the 28th of 1980 the defendant
7 pled guilty to murder and armed robbery and was
8 sentenced by Judge Pompey. And that is a certified
9 statement of that conviction under People versus
10 Jimmy Fletcher, 79-C-8441.

11 MR. COHN: No objection.

12 THE COURT: All right, that certified copy will
13 be used as People's Exhibit No. 2 for sentencing.

14 MS. O'CONNOR: Judge, we have a stipulation with
15 regards to the testimony of a witness that I was going
16 to call but since there is a stipulation I will put it
17 in this way.

18 And it will be with regards to testimony if
19 called Neil Cohen, N-e-i-l C-o-h-e-n, would testify
20 that at the current time he is an attorney licensed to
21 practice in the State of Illinois, employed in the
22 private practice. That in October of 1980 he was an
23 assistant state's attorney, an attorney also licensed
24 to practice in the State of Illinois.

1 That he was assigned to the case of People
2 versus Jimmy Fletcher 79-C-8441. That he reviewed
3 the file from that case and his penitentiary letter
4 that I've shown to counsel. He looked at the
5 photograph of the defendant Jimmy Fletcher a/k/a
6 James Fletcher. He looked at a 19 -- at an old
7 arrest report and he would testify that the defendant
8 in court today being sentenced is the same defendant
9 and that the defendant pled guilty under that case
10 number on October the 28th of 1980 and was
11 subsequently sentenced to murder and attempted armed
12 robbery.

13 MR. COHN: I have no objection to that
14 stipulation.

15 THE COURT: Okay, that will be then admitted as
16 People's Exhibit No. 3.

17 MR. COHN: Oh, no, there is no exhibit being
18 admitted.

19 MS. O'CONNOR: I would if --

20 MR. COHN: Because I object to the pen letter
21 which is attached.

22 THE COURT: Okay.

23 MS. O'CONNOR: All right. I did, for the record
24 I did show it to counsel, Judge, but I was not

1 planning on asking that it be admitted as an exhibit.

2 THE COURT: Okay, all right, then that will be,
3 that stipulation will be entered into the record then.

4 MS. O'CONNOR: I have no witnesses to call,
5 Judge, I would argue but do you want counsel to
6 present their witnesses first or do you want my
7 argument.

8 MR. COHN: I have no witnesses, your Honor.

9 THE COURT: All right, then you can argue.

10 MS. O'CONNOR: Judge, what we are arguing is that
11 the defendant is subject to the mandatory natural live
12 sentencing under Chapter 730 ILCS 5/5-8-1 which is a
13 sentence of imprisonment for a felony. And that
14 section of the code of corrections applies to, the
15 first section of that applies to the crime of murder
16 and gives the perimeters of being sentenced to murder.

17 Under Paragraph C of the murder section it
18 states that the Court shall sentence a defendant to a
19 term of natural life imprisonment when the death
20 penalty is not imposed if the defendant Subsection I
21 has previously been convicted of first-degree murder
22 under any state or federal law.

23 THE COURT: But, counsel, I'm going to ask you
24 was that the law that applied at the time of this

1 offense?

2 MS. O'CONNOR: It was, Judge, I looked it up
3 under the old code. I didn't bring it with me today
4 but I did check it out and I believe I discussed it
5 with trial counsel prior to Mr. Cohen coming in.

6 I --

7 THE COURT: Why don't you quote the quote that
8 was effective in 1990 then.

9 MR. COHN: Your Honor, we'll stipulate that there
10 was one in 1990.

11 THE COURT: All right.

12 MS. O'CONNOR: Under 1990 it was under Chapter 38
13 Section 1005-8-1.

14 THE COURT: Okay.

15 MS. O'CONNOR: And in that section of the
16 criminal code --

17 MR. COHN: What was the code of provision again?

18 MS. O'CONNOR: Chapter 38 1005-8-1.

19 And under the sentence of imprisonment for a
20 felony that relates to murder again the criminal code
21 indicated that if the defendant has previously been
22 convicted of first-degree murder under any state or
23 federal law or is found guilty of murdering more than
24 one victim the Court shall sentence the defendant to a

1 term of natural life imprisonment.

2 I will show counsel that 1990 book that the
3 Court has --

4 THE COURT: All right, take a look at that,
5 counsel.

6 (Whereupon, a brief pause was had:)

7 MS. O'CONNOR: Judge, I believe that law has been
8 in effect for quite some time and it was definitely in
9 effect in 1990. The prior murder conviction
10 obviously is the one that we've been talking about the
11 79-C-8441 conviction.

12 The defendant in this case 02-CR-16669 was
13 convicted of first degree-murder also therefore that's
14 our position that he is subject to the mandatory
15 natural life imprisonment sentence. And not subject
16 to any other type of sentence. There is no other
17 sentence available it is mandatory as a shell.

18 Of course the pre-sentence investigation has
19 other convictions listed most notably the armed
20 robbery in which the defendant was sentenced to
21 twenty-five years in prison along with two other
22 felonies. But the bottom line is it is a second
23 murder and the only sentence available according to
24 the criminal code is the natural life imprisonment.

1 We believe that the evidence that shows the
2 prior murder conviction is included in the
3 pre-sentence investigation. The defendant made a
4 statement with regards to it on Page 3. The Chicago
5 rap sheet has it listed, the certified statement of
6 conviction under People versus Jimmy Fletcher
7 indicates he was convicted of it. And the
8 stipulation to the testimony of former prosecutor
9 Neil Cohen would certainly show that his, he was
10 previously convicted of a murder by a preponderance of
11 the evidence. And I believe that is the standard,
12 Judge.

13 THE COURT: Okay.

14 MS. O'CONNOR: So, that's what we're asking for.

15 THE COURT: Thank you.

16 Defense.

17 MR. COHN: Your Honor, in addition to the issues
18 that I previously raised I point out that in 1979 he
19 was not convicted of first-degree murder only
20 convicted of murder. There was no first-degree
21 murder so therefore there is not an adjoining of the
22 later 1990 statutory provision and the description of
23 the event, in addition to raising the
24 unconstitutionality.

1 THE COURT: Okay.

2 MS. O'CONNOR: Judge, with regards to that and it
3 was to the Jenner and Block attorneys I had, we had
4 sort of talked about this issue and I had faxed them
5 copies of the indictment from the 1979 murder that I
6 can also give this Court where the elements are
7 exactly the same but what is now called first-degree
8 murder.

9 In 1990 what the criminal code indicated was
10 that --

11 MR. COHN: It says first-degree murder, it
12 doesn't say murder, your Honor.

13 MS. O'CONNOR: Judge, what our argument is that
14 the elements of the 1979 murder are exactly the same
15 as the elements of first-degree murder today and
16 perhaps I should have faxed those charging documents
17 to the new attorney but since both counsels are still
18 on the case and Jenner and Block is still involved in
19 it.

20 MR. COHN: Your Honor, we are not disagreeing
21 that it is the same elements we are simply saying that
22 the legislature made its choice.

23 MS. O'CONNOR: I am arguing that they changed the
24 name but the elements weren't change therefore.

1 MR. COHN: That is not what the statute says.

2 THE COURT: I'm sorry, what do you mean they
3 changed the name?

4 MS. O'CONNOR: From, in back when there was
5 murder it wasn't called first-degree murder. There
6 was murder and there was voluntary manslaughter.
7 Today it is first-degree murder and second-degree
8 murder. First-degree murder being the equivalent of
9 what murder used to be, and second-degree murder being
10 equivalent to what voluntary manslaughter was.

11 MR. COHN: Your Honor, the legislature could have
12 chosen the terms it wanted to it didn't make that
13 choice.

14 THE COURT: May I see the statute.

15 MS. O'CONNOR: The old one or the knew one?

16 THE COURT: The old one, the 1990 one is the one
17 that I will rely on.

18 MS. O'CONNOR: By 1990 the nomenclature had been
19 changed to reflect the first-degree murder and the
20 second-degree murder in the criminal code. What the
21 defendant was convicted of in 1979 was actually murder
22 and attempted armed robbery which would be the
23 equivalent of felony murder.

24 THE COURT: Anything further?

1 MR. COHN: Nothing further, your Honor.

2 THE COURT: The statutory, the 1990 edition of
3 Chapter 38 1005-8-1 states that the sentence of
4 imprisonment for a felony will be as follows: For
5 first-degree murder:

6 A, a term shall not be less than twenty and
7 not more than sixty;

8 Or, B, if the Court finds that the murder was
9 accompanied by exceptionally brutal or heinous
10 behavior indicative of wanton cruelty or that any of
11 the aggravating factors listed in Subsection B of
12 Section 9-1 of the Criminal Code of 1961 are present
13 the Court may sentence the defendant to a term of
14 natural life imprisonment;

15 Or, C, if the defendant has been previously
16 been convicted of first-degree murder under any state
17 or federal law or was found guilty of murdering more
18 than one victim the Court shall sentence the defendant
19 to a term of natural life imprisonment.

20 At this time the State argues that the
21 statute applies that the 1979 case was a charge of
22 murder, that the descriptors first-degree murder would
23 be the same. The defense argues to the contrary,
24 that the statute specifically states that he has to be

1 convicted of a previous conviction for first-degree
2 murder.

3 I believe looking back at the statute that
4 I'm familiar with that first-degree murder prior to
5 1961 was basically what the State said it was, that
6 there was a murder and voluntary manslaughter, that
7 later changed to first and second degree.

8 The elements of the crime that were alleged
9 and that were admitted to by Mr. Fletcher in the --
10 oh, I'm sorry, I have to stop here.

11 Mr. Fletcher, would you please stand.

12 Sir, is there anything you would like to say
13 to the Court before I impose sentence on you today?

14 THE DEFENDANT: Just that I'm innocent,
15 your Honor.

16 THE COURT: Okay. Anything else?

17 THE DEFENDANT: No.

18 THE COURT: Okay, thank you.

19 MS. O'CONNOR: Judge, would you like a copy of
20 the charging documents from the 1979 case?

21 THE COURT: If you have them.

22 MS. O'CONNOR: I do have them.

23 THE COURT: Okay, did you tender a copy to the
24 defense?

1 MS. O'CONNOR: I had tendered them to Jenner and
2 Block I would like them to acknowledge them on the
3 record.

4 MR. SALTIEL: Yes, the State did.

5 THE COURT: All right.

6 All right, I now have a copy I'll mark this
7 People's Exhibit No. 3 for purposes of the sentencing.
8 This is a copy of the charging instrument. The
9 allegation was that the defendant on October the 21st,
10 1979, committed the offense of murder in that they,
11 Mr. Jimmy Fletcher and Terry Ware, intentionally and
12 knowingly shot and killed Faheem Aref, A-r-e-f, with a
13 gun without lawful justification in violation of
14 Chapter 38 Section 9-1(A)1 of the Illinois Revised
15 Statutes 1977 as amended.

16 I believe the criminal offense of murder and
17 first-degree murder even though the name was changed
18 during the course of the history of the statute that
19 is the same criminal offense.

20 That the defendant in 1979 was charged and
21 convicted of murder. And that on the jury's finding
22 of guilty of murder on the 02 case before this Court
23 makes it, takes it out of any discretion that this
24 Court may have.

1 I find that based on the second murder
2 Mr. Fletcher is eligible and this Court is required to
3 sentence him to a term of natural life. And that's
4 what this Court will do.

5 Now, Mr. Fletcher, please stand.

6 Mr. Fletcher, even though I'm sentencing you
7 here today you understand that you have the right to
8 appeal. However, prior to your appeal if you choose
9 to challenge the correctness of this sentence or any
10 aspect of your sentencing hearing you must file in the
11 trial court within thirty days of today's date a
12 written motion to reconsider the sentence imposed or
13 to consider any challenge to the sentencing hearing.

14 Within thirty days of the Court's rulings
15 disposing of your motions if you wish to appeal you
16 must then file or request the Clerk of the Court to
17 prepare and file in the trial court a written notice
18 of appeal. You will then be limited on your right to
19 appeal to those claims of error you first set out in
20 your motion challenging your sentence.

21 If you cannot afford an attorney for the
22 purpose of this motion one will be appointed or for
23 the purposes of an appeal one will be appointed. Or
24 if you cannot afford the cost of the transcripts one

1 will be provided.

2 Sir, do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Okay. All right, sir, thank you.

5 (Which were all the proceedings had
6 in the above-entitled cause.)

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1 STATE OF ILLINOIS)

2) SS:

3 COUNTY OF C O O K)
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6 I, Jewel Williams, an Official Court Reporter
7 for the Circuit Court of Cook County, County
8 Department-Criminal Division, do hereby certify that I
9 reported in shorthand the proceedings had in the above
10 entitled cause, that I thereafter caused the foregoing
11 to be transcribed into typewriting, which I hereby
12 certify to be a true and accurate transcript of the
13 Report of Proceedings had before the Honorable
14 JOHN P. KIRBY, Judge of said court.
15
16

17 
18 Official Court Reporter
19 084-001757
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